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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FRANK J. MUSCARELLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In his opening brief ("M. Br."), petitioner Frank J. Muscarello demonstrated: (1) that the ordinary or natural meaning of the phrase "carries a firearm" (18 U.S.C. § 924(c)(1)) is "bears a firearm on one's person" (M. Br. 8-20); (2) that, at its broadest, "carries a firearm" should be limited to "possesses a firearm in an immediately accessible location" (M. Br. 20-22); and (3) that both the court of appeals' construction ("knowingly possesses a firearm in a vehicle") and the government's construction ("transports a firearm") are contrary to ordinary rules of statutory construction as well as the rule of lenity. (M. Br. 23-25)

In response, the government's brief ("U.S. Br.") offers arguments that are wholly unpersuasive: It divorces the meaning of "carry" from its context in section 924(c)(1); violates cardinal rules of statutory construction; contradicts the government's own prior assertions to this Court regarding the legislative history of section 924(c)(1); and erroneously contends that "carrying a firearm" means "transporting a firearm." Accordingly, petitioner's construction of section 924(c)(1) should be adopted, and the judgment below should be reversed.

ARGUMENT

I. "CARRIES A FIREARM" MEANS "BEARS A FIREARM ON ONE'S PERSON"

1. The Plain Language Of Section 924(c)(1), In Context, Makes Clear That "Carries A Firearm" Means "Bears A Firearm On One's Person"

a. ***The Importance Of Context*** **—** Petitioner showed in his opening brief (at 8-20) that the term "carries a firearm" means "bears a firearm on one's person." The government agrees that "carry[ing] a firearm" *includes* bearing a firearm on one's person, but urges that it is not *limited* to that situation. (U.S. Br. 14)

In making this argument, the government places controlling reliance upon "the first definition of the term 'carry'" (U.S. Br. 12, 13; *see also* U.S. Br. 14 n.4) out of two particular dictionaries. But while "first definition[s]" may be useful for ascertaining general definitions of isolated words (as for a high-

school vocabulary test), they say little about what a word means *in context*. (*See* M. Br. 9)[1] "[T]he meaning of statutory language, plain or not, *depends on context*." *Bailey v. United States*, 516 U.S. 137, 145 (1995) (emphasis added; citations and internal quotations omitted). This is a "fundamental principle of statutory construction (and, indeed, of language itself)." *Deal v. United States*, 508 U.S. 129, 132 (1993). Thus, *when a dictionary offers multiple meanings for a word, "all but one of the meanings is ordinarily eliminated by context."* *Id.* at 131-32 (emphasis added).[2]

Obviously, a "first definition" will not necessarily be the *contextual* meaning that should be ascribed to that word.[3] Thus,

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[1] The "first definition" in any given dictionary may represent "the most frequently encountered meaning" of a word (*The Random House Dictionary of the English Language* xxix (1966)), "[t]he earliest meaning ascertainable . . ., whether it is literary, technical, historical, or obsolete" (*Webster's New International Dictionary of the English Language* xv (2d ed. 1950)), or only the "historical" first meaning. *Webster's Third New International Dictionary of the English Language* 17a (1986). This latter dictionary also notes that the numbering of the different senses of a word "does not evaluate senses or establish an enduring hierarchy among them." *Id.*

[2] *See also Ardestani v. INS*, 502 U.S. 129, 135 (1991) ("The word 'under' has many dictionary definitions and must draw its meaning from its context."); *Northern Pacific Ry. v. Soderberg*, 188 U.S. 526, 530 (1903) ("The word 'mineral' is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case.").

[3] For example, in one of the government's two preferred dictionaries, "the most frequently encountered meaning" of the word "bay" is "a body of water forming an indentation of the shoreline, larger than a cove but smaller than a gulf." *The Random House Dictionary of the English Language* at 128. This "first definition" does not aid the reader in understanding that the author of the sentence "I put the saddle on the bay" meant to describe preparing a horse for riding. *See* A. Scalia, *A Matter of Interpretation: Federal Courts and the Law* 26 (1997).

the government's dictionaries note that "secondary meanings," "technical senses" (*Webster's New International Dictionary of the English Language* xvi (2d ed. 1950)), or "specialized senses" are provided in the other listed definitions, *The Random House Dictionary of the English Language* xxix (1966), and that *"[t]he best sense is the one that most aptly fits the context of an actual genuine utterance."* *Webster's Third New International Dictionary of the English Language* 17a (1986) (emphasis added). That is exactly why dictionaries provide both definitions for senses that are context-specific, as well as examples of how these senses are used in their proper context.

When the context — carrying *firearms* — is considered, as petitioner has shown (M. Br. 9-10), major dictionaries "show a remarkable unanimity" (*cf.* U.S. Br. 12) in limiting the definition of "carry arms or weapons" to mean "[t]o wear, bear, or carry them upon the person or in the clothing or in a pocket." *Black's Law Dictionary* 194 (5th ed. 1979). Indeed, even the government's principal preferred dictionary, *Webster's New International Dictionary of the English Language*, likewise offers, as its first definition of the contextual phrase "carry arms," "[t]o bear weapons." *Id.* at 412.

In addition to including definitions for particular contexts, dictionaries also often provide examples of word usage. "These illustrations . . . show how a word is used *in actual contexts*." *Webster's II New Riverside Dictionary* 20 (1984) (emphasis added). *See also Webster's Third New International Dictionary* at 17a (an example "illustrates an appropriate use of the word *in context*") (emphasis added). Thus, the correct contextual understanding of "carries a firearm" — "bears on the person" — is confirmed by the illustration found in one leading dictionary's secondary definition of "carry": "To have or keep on one's person (carry a gun)." *Webster's II New Riverside Dictionary* at 232-33. *See also* II *The Oxford English Dictionary* 921 (2d ed. 1989) (similar). Significantly, no dictionary (to petitioner's knowledge) uses "carry a gun" or any similar construct to illustrate the broad sense of "carry" urged by the government.

Since "firearms" are typically borne on the person, it is not surprising that contextual terms such as "carry arms" or "carries a firearm" are ordinarily understood to mean "bears on one's person." Thus, without further modification (such as "he carries the firearm *in his automobile*"), one would understand the "carrying" of such personal adjuncts as firearms (as well as briefcases, suitcases, and umbrellas — all of which, like guns, contain handles for personal "carrying") to mean "borne on the person" only. But when the object is something *not* ordinarily borne on the person, but more ordinarily moved in a vehicle — *e.g.*, carrying "a spare tire" (*cf.* U.S. Br. 21), a jack, jumper cables, or four tons of road salt — the context confirms that such phrases mean "transported in a vehicle," not "borne on the person."

b. ***The Erroneousness Of The Government's Position*** — The government's erroneous understanding of section 924(c)(1) is confirmed by its inability to propose a coherent definition of "carries a firearm" that would cover *both* a gun in a vehicle (regardless of accessibility) *and* a gun borne on the person.

In opposing certiorari, the government asserted that "to carry an object means to transport it." (Br. in Opp. to Certiorari 6) Unable to rebut petitioner's showing that "carry" *cannot* mean "transport" in view of Congress's repeated use of "transport" in the firearms laws to define different violations (M. Br. 13-14), *see Russello v. United States*, 464 U.S. 16, 23 (1983); *Bailey v. United States*, 516 U.S. at 143, the government now claims to have retreated from its earlier position. While admitting that "'carry' and 'transport' are closely related," the government denies in its merits brief that it is urging "a meaning for the term 'carry' that is interchangeable with . . . 'transport,'" because there are supposedly subtle "connotati[ve]" differences between the two words. (U.S. Br. 21-22)

This denial is unconvincing, for in other portions of its brief the government admits that it is *still* urging that "carry" means "transport." (U.S. Br. 14, 18 n.7, 43) Indeed, when the government seeks to apply its "standard" for carrying, it asks this Court specifically to hold "that an individual carries a gun in a

vehicle under Section 924(c) *by transporting it there.*" (U.S. Br. 43, emphasis added) Moreover, the government's claim that the focus of the word "transport" it *not* on vehicles (U.S. Br. 22-23) is erroneous. In fact, the government has frequently prosecuted defendants for "transporting" a firearm in a vehicle. *See, e.g., United States v. Albarran*, No. 86-5183, 1987 WL 38620 at *1 (4th Cir. Sept. 24, 1987) (prosecution for drug trafficking, and for transporting a firearm in glove compartment of a car under section 924(b)); *United States v. Hernandez*, 662 F.2d 289, 290-91 (5th Cir. 1981) (prosecution for transporting guns under hood of car and in glove compartment).

Similarly, to avoid the problems created by the Fifth Circuit's construction — under which "carrying a firearm" impermissibly "takes on a different meaning" in vehicle cases (Pet. App. 6a, quoting *United States v. Pineda-Ortuno*, 952 F.2d 98, 104 (5th Cir.), *cert. denied*, 504 U.S. 928 (1992); *see* M. Br. 24) — the government appears to suggest that "movement" would also be a prerequisite to a charge of "carrying a firearm" in a non-vehicle case. (U.S. Br. 12, 23) But requiring "movement" as an element of the crime of "carrying a firearm" would be inconsistent with the dictionary definitions of such contextual terms as "carry arms," which require the arms to be physically located on the subject, but place no emphasis whatsoever upon "movement." *See also Black's Law Dictionary* 194 (5th ed.) ("locomotion not being essential" to "carry"). The government's "movement" construction thus would exclude any defendant who was personally armed with a gun during a drug crime, but not proved to be "'moving from place to place'" with it. (U.S. Br. 14, quoting *Webster's New International Dictionary of the English Language* at 412) This would be a bizarre result, since such a non-moving defendant, who could fire a gun and kill in a split second, would present far more of "the 'grave possibility of violence and death'" (U.S. Br. 27, quoting *Smith v. United States*, 508 U.S. 223, 240 (1993)) than petitioner, whose gun was admittedly locked away in a glove compartment at all relevant points in the course of the drug-trafficking crime.

Requiring "movement" as a *sine qua non* of "carrying a firearm" would also result in different treatment of similarly situated defendants. Under the government's proposal, a defendant with a gun in a truck's locked glove compartment would be illegally "carrying" that gun, but a defendant transacting a drug deal while seated at his kitchen table with a gun in a cookie jar (unlocked) on that table would not. Similarly, a defendant seated in the driver's seat of an automobile, with a gun between the seats, would be "carrying" that gun, but a defendant transacting a drug deal while seated on his living-room sofa, with a gun between the cushions, would not. These latter examples of non-vehicular defendants would present *at least* the same "grave possibility of violence and death" as the ones with guns in vehicles, but their conduct — unlike that of their similarly situated counterparts in vehicles — would go wholly unpunished under the government's construction of section 924(c)(1).

Thus, it is hardly surprising, as petitioner showed (M. Br. 11-12), that this Court and its individual members have previously referred to the contextual phrase "carries a firearm" in ordinary and natural ways that would neither require, nor even suggest, a "movement" element. (*See* M. Br. 11-12, quoting *Bailey v. United States*, 516 U.S. at 146 (equating carrying with "handling" and "keep[ing] a gun hidden in [one's] clothing"); *Smith v. United States*, 508 U.S. at 236 ("keeping it on his person"); *id.* at 245-46 (Scalia, J., dissenting) ("carrying it in such a manner as to be ready for use as a weapon"); *United States v. McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting)). The government offers no response to this showing, nor could it.[4]

[4] Nor does the government respond to Judge Kozinski's recognition, for the *en banc* Ninth Circuit in *United States v. Foster*, that the statement "Don Corleone is carrying a gun" is ordinarily understood to mean that "the Don has a sidearm *somewhere on his person.*" 133 F.3d 704, 705 (9th Cir. 1998) (*en banc*) (emphasis added).

Indeed, in view of "carry"'s companion in section 924(c)(1) — "use" — it would be incredible to conclude that Congress meant "carry" to mean "movement" of a firearm. As petitioner showed (M. Br. 15), this Court in *Bailey v. United States*, 516 U.S. at 150, announced a narrowly circumscribed definition of "using" a firearm — "actively employ[ing]" it. This says much about what Congress meant to criminalize by imposing heavy sentences upon one who "uses or carries a firearm." It is doubtful that Congress would have penalized "active employment" — which would include such dangerous activities as firing into a crowd — on parity with merely transporting a gun in a location such as a locked compartment, where it could not be easily and quickly "used." Contrary to the government's argument, it is not "some overarching principle of narrow construction that is unique to Section 924(c)" (U.S. Br. 40) that leads to this conclusion; rather, it is the well-established rule that a word is known by the company it keeps (*noscitur a sociis*). *E.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).[5]

Finally, the government seeks to make much out of the fact that no court of appeals has yet interpreted "carr[ying] a firearm" as meaning "bearing a firearm on one's person." (U.S. Br. 18, 39-40) But this Court does not construe statutes by tallying the

[5] The government also misunderstands petitioner's point (M. Br. 16) about the lesser penalties imposed by statute for "transporting," "possessing," or "shipping" firearms, as well as under the United States Sentencing Guidelines for merely "possess[ing]" a firearm. *See* U.S.S.G. § 2D1.1(b)(1) (1997). It is not that these penalties were specifically considered by Congress in 1968, or even in 1984 when the statute was amended to include the present "uses or carries a firearm" language. (U.S. Br. 31 n.17) The point is that the wide disparity between the penalties (*e.g.*, between the guideline enhancement (four months) and the statutory mandatory minimum (five years)) illuminates the serious nature and consequent narrow meaning of "carrying" a firearm. *See United States v. McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting).

votes of lower courts. To the contrary, this Court not infrequently reaches results that are contrary to all or most of the courts of appeals. For instance, in *Bailey v. United States, supra*, the government recognized in its brief on the merits (at 16 n.4) that no court of appeals had previously adopted an "active employment" construction of "uses . . . a firearm" in section 924(c)(1) — yet this Court adopted just such a construction of that phrase. 516 U.S. at 144. *See also, e.g., McNally v. United States*, 483 U.S. 350, 364 (1987) (Stevens, J., dissenting) (recognizing that all of the federal courts of appeals to have construed the mail-fraud statute had previously read the statute in the fashion rejected by the majority).

c. ***The Irrelevance Of Cases Cited in Black's*** — The government discusses at great length the cases cited in the various earlier editions of *Black's Law Dictionary* for the entry "carry arms or weapons." (U.S. Br. 16-18 & nn. 5-7) Based on its analysis of these cases — particularly *State v. Murray*, 39 Mo. App. 127 (1890), and *State v. Carter*, 36 Tex. 89 (1871) — the government concludes that *Black's* "provides no support whatever for petitioners' claim that 'carry,' as used in Section 924(c) without the qualifying phrase 'on the person,' is nonetheless limited to carrying on the person." (U.S. Br. 17)

Petitioner is at a loss to understand the government's argument: *The definition itself* provides just that sort of "support" — it defines "carry arms or weapons" to mean "[t]o wear, bear, or carry them upon the person or in the clothing or in a pocket." *Black's Law Dictionary* 194 (5th ed.). Indeed, this Court often looks to *Black's* for definitions of words or phrases in statutes, and it virtually always relies upon the definition itself, not the cases cited there.[6] Were the practice otherwise, as the

[6] *See, e.g., Kawaauhau v. Geiger*, No. 97-115, 1998 WL 85302, *3 n.3 (U.S. March 3, 1998) ("willful"); *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 117 S. Ct. 796, 801 (1997) ("entitle"); *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) ("cognizable"); *Molzof v. United States*, 502 U.S. 301, 307 (1992) ("punitive damages"); *United States v. Turley*, 352 U.S. 407, 412 (1957) ("steal").

government suggests, the definitions themselves would be largely worthless. And petitioner knows of no case, from this Court or any other, that has parsed the language of cases cited in *Black's Law Dictionary* and concluded that the *Black's* definition was wrong. Yet that is just what the government urges here.

In fact, to interpret the phrase "uses . . . a firearm" in section 924(c)(1), this Court relied upon the current (sixth) edition of *Black's Law Dictionary* in both *Bailey v. United States*, 516 U.S. at 145, and *Smith v. United States*, 508 U.S. at 228-29. Significantly, even though the sixth edition *does* cite cases under its "use" entry (*see Black's Law Dictionary* 1541 (6th ed. 1990)), in neither *Bailey* nor *Smith* did the Court see fit to analyze the cited cases in order to expound upon (let alone *contradict*) the dictionary definition of "use."

In all events, the two cases cited in the older editions of *Black's* do not aid the government at all. The government suggests that because the statutes at issue in these cases both modified their prohibitions upon "carrying" weapons with "on the person" or similar language,[7] "the legislatures that enacted those statutes showed the common understanding that the term 'carry,' as used in Section 924(c) without that qualification, would have a broader meaning." (U.S. Br. 17) What the government fails to recognize is that those statutes also criminalized carrying weapons concealed "about" one's person — a qualification that is generally understood to impose an "immediate accessibility" requirement, not an "on the person" standard. (*See* U.S. Br. 37 n.22) *See also Black's Law Dictionary* 982 (5th ed.) ("about," in statutes making it an offense to carry a weapon "on or about" the

[7] For example, the Missouri statute criminalized "carry[ing] concealed upon *or about* [one's] person any deadly or dangerous weapon." Mo. Rev. Stat. § 3502 (1889) (emphasis added). The Texas statute, similarly, criminalized "carry[ing] on *or about* [one's] person, saddle, or in [one's] saddle bags, any pistol." 1879 Tex. Crim. Stat. tit. IX, art. 318 (Penal Code) (emphasis added).

person, "convey[s] the idea of being nearby, in close proximity, within immediate reach, or conveniently accessible"). Thus, it is hardly surprising that these state legislatures, to avoid the awkward phrasing of "carry about the person," used the more common "on or about the person" language.

d. ***The Irrelevance Of Federal Authorization Statutes*** — The government also urges that its construction of section 924(c)(1) is supported by federal "authorization statutes" that allow certain federal officials "to carry firearms." (U.S. Br. 31-34 & n.18) The government's theory is that, if section 924(c)(1)'s prohibition upon "carr[ying] a firearm" is construed to mean bearing a firearm on one's person, then the various "authorization statutes" will also have to be so limited, such that federal officials could carry a gun in a holster, but not "remove such guns upon entering a car and lay them on the seat, place them in a locked glove compartment, or put them in the trunk." (U.S. Br. 33)

The government's argument is seriously mistaken. The authorization statutes cited by the government are totally unrelated to the legislation that contained section 924(c)(1). Indeed, those statutes are so fundamentally different from section 924(c)(1), both in their language and in their approach, that they lend no assistance in understanding the meaning of section 924(c)(1)'s prohibition upon "carr[ying] a firearm." As one leading treatise warns, "[t]he interpretation of one statute by reference to an analogous but unrelated statute is considered *an unreliable means of discerning legislative intent.*" 2B N. Singer, *Sutherland Statutory Construction* § 53.05, at 238 (5th ed. 1992) (emphasis added). Even the government's own authorities, *Reno v. Koray*, 515 U.S. 50, 56-57 (1995), and *Gozlon-Peretz v. United States*, 498 U.S. 395, 407-08 (1991) (*see* U.S. Br. 31), bear out this principle. These cases, and many others decided by this Court, establish only that "other, *related* legislative enactments" may be useful, and then only for "interpreting *specialized* statutory terms." *Id.* at 408 (emphasis added). *See also Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Northcross v. Board of Education of the Memphis City Schools*, 412 U.S. 427, 428 (1973) (per curiam).

For several reasons, the principle relied upon by the government is wholly inapposite here. *First*, none of the authorization statutes is "related" to the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, which enacted present-day section 924(c)(1). *Compare Reno v. Koray*, 515 U.S. at 56 (interpreting provision of Sentencing Reform Act of 1984 with reference to a similar provision in the Bail Reform Act of 1984, which were "enacted in the same statute"). Nor do the authorization statutes "share a common purpose" with section 924(c)(1), *Oscar Mayer & Co. v. Evans*, 441 U.S. at 756; indeed, the purpose of section 924(c)(1) (*prohibiting* the carrying of a firearm by individuals engaged in a crime of violence or drug trafficking) is entirely different than that of the authorization statutes (*permitting* the carrying of a firearm by certain federal officials).

Second, "carries a firearm" is not the sort of "specialized statutory ter[m]" that would merit application of the principle relied upon by the government. Unlike in *Gozlon-Peretz*, where the term at issue was "supervised release," 498 U.S. at 407, and in *Reno v. Koray*, where the disputed term was "official detention," 515 U.S. at 56, the term here is an ordinary one — "carries a firearm" — and even the government concedes that this is not a "specialized statutory ter[m]," but one that "must be construed 'in accord with its ordinary or natural meaning.'" (U.S. Br. 12, quoting *Smith v. United States*, 508 U.S. at 228)

Third, and in any event, contrary to the government's argument (U.S. Br. 33), the authorization statutes can function with no "inexplicable gaps" if the phrase "carries a firearm" is interpreted to mean "bears on the person." Because such statutes are interpreted broadly, in order to achieve their obvious and intended purposes it is appropriate to apply the salutary principle that the greater power includes the lesser. *See, e.g., United States v. O'Neil*, 11 F.3d 292, 296 (1st Cir. 1993) ("The principle that the grant of a greater power includes the grant of a lesser power is a bit of common sense that has been recognized in virtually every legal code since time immemorial."). Thus, if a federal official is allowed to have a firearm on his person, he is

necessarily allowed to put it on his seat or elsewhere in the car when he drives. To illustrate the point, one authorization statute cited by the government also gives United States Marshals the authority only to "make arrests without warrant" (18 U.S.C. § 3053). The Second Circuit has held that U.S. Marshals also possess the power to make *Terry* stops, even though such stops are not "arrests" within the common meaning of that word, because "the power to take reasonable law enforcement steps short of, but which may well lead to an arrest can be fairly implied from the grant of powers of arrest." *United States v. Riggs*, 474 F.2d 699, 702 n.2 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973). The Second Circuit further noted that "[t]here would be no merit" in a contrary contention. *Id.*

e. ***The Irrelevance Of State Concealed Weapons Statutes*** — The government's argument with respect to *Black's Law Dictionary* (*see* p. 8, *supra*) foreshadows its similar contention (U.S. Br. 34-40) that, because many state concealed weapons laws modify their "carrying" prohibitions "by expressly using a phrase such as 'on or about the person' or the like" (U.S. Br. 35), the unmodified term "carries a firearm" must admit of a broad construction. But there is no evidence that Congress looked at any of these state laws in drafting present section 924(c)(1), and there is too much of a "wide variety of state statutes on th[is] subject" (U.S. Br. 34), not to mention state-court decisions interpreting those statutes, for any meaningful conclusions to be drawn from them. Nor does the government cite a single case that ascribes any significance to such state laws in construing section 924(c)(1). More fundamentally, however, the government's analysis leads nowhere.

First, the government discusses state statutes that "prohibit carrying a firearm . . . by expressly using a phrase such as 'on or about the person' or the like." (U.S. Br. 34-37 & nn. 21-22) As noted above, however, statutes that criminalize carrying a firearm "on or about" the person capture not only those defendants who personally bear a firearm ("on"), but also those who bear a firearm in an area not "on," but immediately accessible to the defendant ("about"). *See, e.g., State v. McNary,*

596 P.2d 417, 420 (Idaho 1979) (cited in U.S. Br. 37 n.22); *Black's Law Dictionary* 982 (5th ed.). Thus, as with the statutes cited in the cases from the older editions of *Black's Law Dictionary*, most of these legislatures properly included both "on" and "about" in order to confirm, with clarity, that the statutes penalized both personal carrying *and* possession of guns in an immediately accessible area.

Second, the government cites state statutes that criminalize both carrying "on or about" one's person *and* in a vehicle. Far from advancing the government's argument, however, those statutes only undermine it. Under the government's view that "carry" includes *both* firearms borne on the person *and* firearms transported in a vehicle, the addition of "in a vehicle" (or for that matter, of any modifying language) would seem to be unnecessary surplusage. (*Cf.* U.S. Br. 35-37)

Finally, the government cites a handful (five) of state laws that prohibit the "carrying" of concealed weapons without any qualification (and in particular the state cases interpreting three of those statutes). Those statutes and cases *at most* support petitioner's alternative proposal that "carried" means "immediately accessible." They do *not* support the government's attempt to equate "carries a firearm" with "transports a firearm."

The Mississippi statute, which proscribes "carr[ying], concealed in whole or in part," Miss. Code Ann. § 97-37-1 (1994), has been interpreted by that state's highest court for almost 70 years to require that the weapon be "'*readily accessible and available for use.*'" *L.M., JR., S.T. & D.S. In the Interest of*, 600 So. 2d 967, 970 (Miss. 1992) (cited in U.S. Br. 39; emphasis in original), quoting *Clark v. City of Jackson*, 124 So. 807, 808 (Miss. 1929).[8] The Utah statute, prohibiting "carrying

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[8] Having articulated the *Clark* standard in Part I of its opinion, the Mississippi Supreme Court in Part III inexplicably affirmed one defendant's conviction, for having a gun under the hood of his car, because he "knew of the existence and was in constructive possession or control of the weapon in the vehicle." *L.M., JR., S.T. & D.S. In the*

a concealed dangerous weapon," Utah Code Ann. § 76-10-504(1)(b) (Supp. 1997), has also been construed to impose an "immediately and easily accessible" requirement. *State v. Williams*, 636 P.2d 1092, 1095 (Utah 1981). Even so, the Utah Supreme Court was able to broaden the meaning of "carry" a weapon (beyond "on the person" to "immediately accessible") only because of a liberal Utah rule of statutory construction that flatly conflicts with this Court's rule of lenity jurisprudence. *Id.* Finally, the Tennessee statute, which prohibits "carr[ying a weapon] with the intent to go armed," Tenn. Code Ann. § 39-4921 (Supp. 1981) (now Tenn. Code Ann. § 39-17-1307(1) (1997)), has been interpreted only by that state's *intermediate* criminal court of appeals, which equated "carrying" with "possession of the pistol" — a position even the government disavows. (U.S. Br. 21, "under both petitioners' view and ours, proof of possession alone does not amount to proof of carrying"). *See State v. Warr*, 604 S.W.2d 66, 68 (Tenn. Crim. App. 1980).

In short, the government gains nothing from its laborious analysis of these state firearm statues. The government succeeds only in demonstrating the utter lack of merit in its own attempt to equate "carries a firearm" with "transports a firearm."

2. The Government's Legislative-History Argument Is Misguided And Squarely Contradicts Arguments That It Made To This Court In *Bailey v. United States*

Petitioner showed (M. Br. 17-19) that the "sparse" legislative history behind section 924(c)(1), *see Simpson v. United States*, 435 U.S. 6, 15 (1978), as originally enacted, supports his preferred construction, because every relevant reference to "carrying a firearm" uses the term to mean "borne on the person." The government, in response, repeatedly trumpets a single statement, made by the amendment's sponsor and "echoed

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Interest of, 600 So. 2d 967, 971 (Miss. 1992). Three justices dissented, noting that "Part III of the majority opinion and its disposition . . . is wholly at odds with Part I and the law." *Id.* at 972 (Banks, J., dissenting).

by others" in the House during the brief floor debates over that amendment, that "[t]he effect of a minimum mandatory sentence in this case is to persuade the man who is tempted to commit a Federal felony to leave his gun at home." 114 Cong. Rec. 22,231 (1968) (statement of Rep. Poff), quoted in U.S. Br. 25, 26, 30. According to the government, Poff's comments are both inconsistent with petitioner's proposed construction and entitled to significant weight in determining the meaning of "carries a firearm." (U.S. Br. 25-27)

The government's position with respect to what can be drawn from Representative Poff's floor comments is a complete about-face from its recent representations to this Court. Only two Terms ago, in *Bailey v. United States*, the Solicitor General told this Court, in describing the very same passage, that "Representative Poff was referring to the 'uses' prong of the original Section 924(c)," and was *"not referring to the 'carries' prong of the original Section 924(c)."* Brief for the United States at 28, *Bailey v. United States*, 516 U.S. 137 (1995) (Nos. 94-7448 and 94-7492) (emphasis added). Having made that representation in an unsuccessful effort to obtain a broad construction of section 924(c)(1)'s "uses . . . a firearm" component, the government cannot be taken seriously when it relies upon that very same legislative history to seek a broad construction of the statute's "carries a firearm" component.

In any event, Poff's statement provides no guidance in construing the "carries a firearm" component of the statute. As the government itself noted, when section 924(c)(1) was originally enacted, it proscribed only the *unlawful* carrying of a firearm; thus, the "carries a firearm unlawfully" proviso "would have had no force in 'persuading' such an individual [licensed lawfully to carry a firearm] 'to leave his gun at home.'" *Id.* This same reasoning also renders irrelevant virtually all of the other floor comments cited by the government which "echoed" Representative Poff's comment. *See* U.S. Br. 25, 26 (citing 114

Cong. Rec. 22,243-22,244 (Rep. Hunt); *id.* at 22,244 (Rep. Randall); *id.* at 22,236 (Rep. Meskill)).[9]

If Congress had wished to pass a statute to ensure that every drug-trafficking defendant would "leave his gun at home," it had ample ability to do so by criminalizing the *possession* of a firearm, not the "use" and "carrying" of a firearm. Congress can do so now if it wishes.[10]

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[9] The government also urges (U.S. Br. 25-26) that a floor statement of Representative May supports its reading of the statute. The quoted language was from a resolution passed at the 1968 Annual Conference of the Washington Association of Sheriffs and Police Chiefs, which "urg[ed] and recommend[ed] that carrying short firearms in motor vehicles be classified as carrying such weapons concealed." 114 Cong. Rec. 22,242. Both the language of the resolution, and Representative May's reliance upon it, refer solely to *state* laws involving "carrying such weapons concealed," which have traditionally been within the purview of the states. (U.S. Br. 31, 34-40) And Representative May cited that resolution simply to make a "point" that she thought was "effectively spelled out" by the resolution: "[I]t is unlikely that there can be truly effective regulation of the use and ownership of firearms *if the States and local communities* do not work to enact and enforce meaningful laws and ordinances." 114 Cong. Rec. 22,242 (emphasis added). Thus, this passage sheds no light whatsoever on the meaning of "carries a firearm" in section 924(c)(1).

[10] In his opening brief (M. Br. 14 n.5), petitioner noted the current congressional efforts to amend section 924(c)(1), including the Senate's passage of S. 191. The bill then pending in the House, H.R. 424, 105th Cong. (1998), has now been passed by that body. *See* 144 Cong. Rec. H 535-36 (daily ed. Feb. 24, 1998). The House legislation has been transmitted to the Senate, where it has been referred to the Senate Committee on the Judiciary. Likewise, S. 191, 105th Cong. (1998) has been transmitted to the House, where it was referred to the House Committee on the Judiciary.

3. The Rule Of Lenity Confirms The "Bears On The Person" Construction

Petitioner showed (M. Br. 19-20) that, even if the plain language of section 924(c)(1) did not compel the "bears on the person" interpretation of "carries a firearm," this construction is at least reasonable, and thus should be adopted under the rule of lenity. The government responds by urging (U.S. Br. 41-42) that the rule of lenity should not apply because there is no ambiguity in the language or structure of the act.

As petitioner has shown, the meaning of the statute is indeed clear — but not in the way the government suggests. But even if the government's "transporting a firearm" construction were "reasonable" — which it is not — it is obviously not the *only* "unambiguously correct" one. *United States v. Granderson*, 511 U.S. 39, 54 (1994). Faced with such a choice between interpretations, petitioner's narrower construction should prevail under the rule of lenity.

4. Under The "Bears On The Person" Construction, Petitioner's Conviction Must Be Reversed

The government concedes that petitioner did not "carry a firearm" under petitioner's "bears a firearm on one's person" construction by transporting it in a locked glove compartment. If, as petitioner maintains, that construction is correct, then the government concedes that he is entitled to "outright reversal." (U.S. Br. 43)

II. AT ITS BROADEST, "CARRIES A FIREARM" SHOULD BE LIMITED TO "BEARS IN A LOCATION IMMEDIATELY ACCESSIBLE TO THE DEFENDANT"

1. As petitioner noted in his opening brief (M. Br. 21), construing "carries a firearm" to mean "possesses in a vehicle in a manner immediately accessible to the defendant," which petitioner has proposed as an alternative construction of section 924(c)(1), would be somewhat less faithful to the language and context of that statute than the "bears on the person" construction

discussed in Section I, *supra*. Nonetheless, three federal courts of appeals have interpreted the statute in that fashion,[11] and — as the government itself notes — several state statutes that prohibit the simple "carrying" of concealed firearms have been interpreted similarly by state courts of last resort. *See L.M., JR., S.T. & D.S. In the Interest of*, 600 So. 2d at 970; *State v. Williams*, 636 P.2d at 1094. This interpretation has far more validity than the all-encompassing "anywhere in the car" standard urged by the government.

2. Petitioner showed in his opening brief (M. Br. 22) that construing "carries a firearm" in this alternative fashion would also be consistent with the rule of lenity. As noted, the government views its construction as the only reasonable one, and thereby suggests that the "immediately accessible" construction is not a reasonable alternative. (U.S. Br. 20-21) This is difficult to square with the government's other arguments. Indeed, the government has favorably relied upon decisions from two state courts (*L.M., JR., S.T. & D.S. In the Interest of, supra; State v. Williams, supra*) that have held the unmodified word "carries" in their firearms statutes to mean, respectively, "readily accessible and available for use" and "immediately and easily accessible." (U.S. Br. 39) Unless the government is relying upon "unreasonable" state-court interpretations to support its own views, a similar construction of the "carries a firearm" component of section 924(c)(1) would have to be preferred over the government's sweeping interpretation — even if the latter could possibly be said to be reasonable.

3. Petitioner showed (M. Br. 22) that even under the alternative "immediately accessible" construction of "carries a firearm," his conviction would have to be reversed outright, because the firearm was located in a locked glove compartment — which could not satisfy any reasonable understanding of

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[11] *See United States v. Foster*, 133 F.3d at 708; *United States v. Riascos-Suarez*, 73 F.3d 616, 623 (6th Cir.), *cert. denied*, 117 S. Ct. 136 (1996); *United States v. Cruz-Rojas*, 101 F.3d 283, 286 (2d Cir. 1996).

"readily accessible." The government concedes that, at the very least, a remand for further factual findings would be in order under such a test. (U.S. Br. 43-44)

In fact, reversal *without* remand would be appropriate. It is well established — as a recognized treatise on automobile law states — that a firearm in a locked glove compartment is not "immediately accessible" under the general understanding of that construct. 8A Blashfield, *Cyclopedia of Automobile Law and Practice* § 5528.90, at 119 (perm. ed.).[12] The cited section of Blashfield explains that, while a weapon carried in an *unlocked* glove compartment is often held to be carried "about" the person (which Blashfield defines as "within reach, or readily accessible, and available for use," *see id.* § 5528.88, at 110) (footnotes omitted), *"a contrary result" obtains "if the compartment is locked." Id.* § 5528.90, at 119 (emphasis added), citing *Turley v. Commonwealth*, 209 S.W.2d 843 (Ky. 1948). Blashfield cites no contrary authority involving *locked* glove compartments, and the government's authorities are also not to the contrary.[13]

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[12] Ironically, this section of Blashfield is cited in the fourth edition of *Black's Law Dictionary* in connection with the definition of "on or about," "[a]s used in statutes making it an offense to carry a weapon 'on or about' the person." *Black's Law Dictionary* 1240 (rev. 4th ed. 1968). Under the government's approach (U.S. Br. 16 n.5), the fact that a pertinent section of *Black's* cites Blashfield gives that source particular significance.

[13] *United States v. Holifield*, 956 F.2d 665 (7th Cir. 1992), involved neither section 924(c)(1) (or any other gun statute) nor an "immediate access" standard; it concerned whether a protective search of a locked glove compartment in a stopped vehicle was valid under the Fourth Amendment. *Id.* at 666, 668-69. *State v. Walton*, 429 N.W.2d 133 (Iowa 1988), involved an *unlocked and open* glove compartment, as the defendant was arrested when he opened the glove compartment to retrieve his driver's license and the arresting officer spotted a gun "in plain view" in the open glove compartment. *Id.* at 133. And, in *Ensor v. State*, 403 So. 2d 349, 354 (Fla. 1981), the Court's suggestion that "generally," a gun in a glove compartment, whether locked or unlocked,

In sum, this Court should reverse petitioner's section 924(c)(1) conviction outright, since — under either construction proposed by petitioner — it is clear that petitioner did not "carr[y] a firearm" by having it in the locked glove compartment of a pickup truck.

CONCLUSION

For the foregoing reasons, and those stated in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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may be "on or about the person" was necessarily *dicta*, since the gun in question was under the passenger's floormat, not in a glove compartment.